Office-Supreme Court, U.S.
FILED
FEB 5 1962
JOHN F. DAVIS, CLERK

**No. 94**

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*v.*

FLORIDA CITRUS CANNERS COOPERATIVE,

*Respondent.*

## BRIEF OF RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HAMILTON & BOWDEN
By O. R. T. BOWDEN
1056 Hendricks Avenue
Jacksonville 7, Florida
Attorneys for Respondent

# INDEX


| | Page |
|---|---|
| Statement of Case | 2 |
| Summary of Argument | 19 |
| Argument | 21 |
| Conclusion | 38 |


## CITATIONS

Cases:


*Adams Packing Association, Inc.* 44 L.R.R.M. (N.L.R.B. 1959) ..... 24, 32

*Bryan Brothers Packing Company*, 129 N.L.R.B. 285 (1960) ..... 27

*Gross Telecasting, Inc.*, 129 N.L.R.B. 490 (1960) ..... 35

*Midstate Hauling Co., Inc.*, 129 N.L.R.B. 1150 (1960) ..... 35

*National Labor Relations Board v. Gibbs Corporation, et al*, —— F.2d ——, 49 L.R.R.M. 2340 (5th Cir. 1962) ..... 36

*National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477 (1960) ..... 31

*National Labor Relations Board v. Minute Maid Corporation*, 283 F. 2d 705 (5th Cir. 1960) ..... 12, 32

*National Labor Relations Board v. The Newton Company*, 236 F.2d 438 (5th Cir. 1956) .... 37

*Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474 (1951) ..... 19, 21, 22, 31, 32, 34, 37

Cases—Continued

Page

Statute:

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151 *et seq.*:

Section 8(a)(1) ..... 21, 35, 37
Section 8(a)(3) ..... 14
Section 8(a)(5) ..... 7
Section 10(e) ..... 22, 33

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

---

## No. 94

---

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*v.*

FLORIDA CITRUS CANNERS COOPERATIVE,

*Respondent.*

---

## BRIEF OF RESPONDENT

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

The opinion of the court below is reported at 288 F. 2d 630. The decision and order of the Petitioner and the Intermediate Report of the Trial Examiner are reported at 124 N.L.R.B. 1182.

## STATEMENT OF CASE

Respondent's plant, where citrus friut is processed into concentrate, single strength juice, and grapefruit sections, is located at Lake Wales, Florida in the heart of the Florida citrus belt.

From 1947, to January 29, 1957, Respondent's production and maintenance employees had been represented by Citrus Workers Local Union No. 24217, affiliated with the American Federation of Labor, and a succession of collective bargaining contracts had been successfully negotiated between that union and Respondent without a strike. In an election held on January 29, 1957, however, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Citrus, Canners, Food Processing and Allied Workers, Drivers, Warehousemen and Helpers, Local No. 173, hereinafter called the Teamsters or the union, received a majority of the votes cast, and on February 6, 1957, it was formally certified by the Petitioner. (I R. 69)[1].

Contemporaneously with the election at Respondent's plant and the certification of the union, the other Teamster locals within Joint Council 89 of the union had won elections at a number of other citrus plants in the area (Minute Maid at Auburndale, Florida, see 283 F. 2d 705; Adams Packing Association, Inc. at Auburndale, Florida, see III R. 37, 44 L.R.R.M. 1571; Stokely-Bordo at Haines City, Florida; Bordo Products Company at Winter Haven, Florida; and Lake Wales Citrus Growers at Lake Wales, Florida.) (I R. 70).

Union negotiator Wingate, an employee of Joint Council 89 of the union and a business agent of Locals

[1] The three volumes of the printed record will be separately referred to as "I R., II R., or III R."

173, 60, and 444, admitted that it was the Teamsters' aim to negotiate a common industry contract at all the citrus plants insofar as possible and to coordinate the bargaining activities of the union's negotiators. (I R. 70). The Trial Examiner stated:

> "It was apparent from the evidence as a whole that it was the Union's attempts at coordination which accounted to a considerable extent for some of the delays in negotiations and for its failure to press Respondent more vigorously for meetings. Certainly that was so at the outset, for Wingate admitted that the first meeting was not scheduled until April 16, [1957], more than 2 months after the certification, because the central bargaining committee was trying to prepare a single proposal which might be acceptable to all the plants. *As will be seen, there were later substantial delays at critical points in negotiations for which the union was responsible.*" (Emphasis added) (I R. 71).

Thus, the *union* delayed bargaining until April. Once bargaining commenced, however, considerable progress was made in several formal sessions held through August, 1957. Although the General Counsel's complaint alleged that Respondent's bad faith dated back to July 14, 1957, the Trial Examiner (the Petitioner adopted the Examiner's recommendations except for one point) concluded that there was no evidence of bad faith bargaining prior to the end of the October negotiations. (I R. 74, 113).

Several bargaining sessions were thus held between April and August, and one meeting was held on September 19, 1957, at which meeting Wingate took over for the union. (I R. 74). Prior to this time John Roberts was chief negotiator for the union; he left his

union job around the first of September and went with Minute Maid Corporation. (I R. 72). At the September 19th meeting Wingate stated that he agreed to prepare a new proposal (the union's original proposal, the Respondent's original counter-proposal and the old AFL contract were still on the table), although this would have to wait and the scheduling of the next session would have to be delayed because Wingate wanted to go to the Teamster's international convention in Miami. (I R. 73-75). Four sessions were held in October (after the convention) at which differences were disclosed in the Respondent's desire for management prerogatives and a no-strike clause, and the union's desire for a maintenance of standards, hot cargo, and separability and savings clauses. At the last of the October meetings (the 31st) the union agreed that the next move was up to it. (III R. 78). The Trial Examiner observed that during this period and after the October 31st meeting that the *union* was guilty of permitting lengthy delays in meeting and that Respondent's conduct did *not* establish that it was engaging in dilatory or stalling tactics. (I R. 78-79).

On December 4, 1957, M. A. Stephenson, Respondent's Production Manager, and Wingate, the union's chief representative, had a "man-to-man" talk, each expressing his personal views and neither attempting to bind his committee. (Compare the "over a cup of coffee" chat in the *Adams Packing* case. III R. 47). The court below stated accurately:

> "There is a wide divergence between the testimony of Stephenson and Wingate as to what transpired at this interview. The Examiner, apparently, did not wholly believe either, since he found, 'The true posture of this private meeting lies somewhere be-

tween the respective claims.' The Examiner rejected the view of Wingate 'that about all that was left was to call the committee together to ratify' the results which he and Stephenson had reached. But the Examiner found that 'the notes and the discussions indicated that an agreement was not only possible but near.' Such an inference was at variance with the testimony of Stephenson. It is, we think, not particularly vital to determine whether the facts regarding this private and 'off the record' meeting were as related by Wingate, or by Stephenson, or, as the Examiner found, 'somewhere between the respective claims.' It was nothing more than what it purported to be and no reference was made to it in the subsequent bargaining sessions." (III R. 79)

The union wired Stephenson on December 11, 1957, "renewing" its request for the next meeting and proposed the next day, December 12th. After receipt of the wire Stephenson on the same day (December 11) wired back that because of a conflict, Respondent's representatives could not meet the 12th and proposed instead December 18.

It was in this state of affairs—another negotiation meeting proposed for the 18th and the Respondent having been bargaining in good faith for some eight months—that a catastrophe occurred in the Florida citrus industry. On the nights of December 12 and 13, 1957, disastrous freezes occurred in the Florida citrus belt, exceeding in severity any which had occurred since December, 1934. (I R. 85). There was no way, so the Trial Examiner found, by which the extent of the loss and the effect on the industry could be gauged at that time. As the Examiner observed: "* * * the

freeze was obviously a factor which would tremendously affect Respondent's operations and which would necessarily influence any negotiations for a contract since, not only were wages and other cost items directly involved, but also question of hours and opportunities for employment generally. Though a shorter season was one result which could definitely be forecast, there would be peak periods and excessive work schedules during the emergency harvesting and processing periods." (I R. 85)

On December 13, Wingate confirmed Stephenson's wire of December 11, proposing December 18 as the next meeting date.

Marvin H. Walker, Respondent's General Manager, having read W. W. Teague's (chief union negotiator in the area) publicized (II R. 567) strike threat (which Teague denied making, II R. 412) on December 11, decided to attend the December 18 meeting to request the same consideration which the union had given other citrus companies because of the freezes, i. e., a suspension of negotiations pending appraisal of the weather catastrophe (I R. 85; III R. 50). Walker did come to the meeting, which commenced about two o'clock in the afternoon, intending to ask for a delay in negotiations (II R. 443). The intention of wanting to make a statement was announced at the opening of the meeting, but Wingate insisted on speaking before Walker (II R. 416; I R. 86-87; III R. 80).

Wingate then made a lengthy statement in which he reviewed the negotiations, accused the Respondent of engaging in stalling tactics, made his own personal appraisal of the freeze, stating the freezes were not a factor which would be considered in negotiations. He concluded by stating that the union's negotiating com-

mittee was authorized to call a strike whenever it saw fit; and *then he gave Respondent a deadline of four o'clock that afternoon to reach a contract or give assurances that a contract would be reached* (I R. 87; II R. 417; III R. 80). A strike was the alternative tendered by the union if Respondent refused to meet the union's ultimatum (I R. 87; III R. 80). Confronted with the union's strike threat, Respondent's Walker made no request for a delay in negotiations. He said "The clear, unmistakable implication of your remarks, Mr. Wingate, is that if we don't sign a contract with you by tonight you will strike. That is a threat. I don't like threats, I don't respond under the pressure of threats, and I have nothing more to say." (II R. 419). The union made no effort to prolong the meeting which then broke up, and the union did not attempt to setup another meeting (III R. 80; II R. 419).

On the basis of this record, Trial Examiner George A. Downing and the Petitioner found that on and after this date (December 18) Respondent violated Section 8 (a) (5) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*) hereinafter called the Act, by refusing to bargain in good faith (I R. 130). Indeed, the Trial Examiner and the Petitioner reached the conclusion that on December 18, 1957, Walker was "*required*" to make his plea for suspension of negotiations, notwithstanding the union's most unreasonable position. (Emphasis the Trial Examiner's) (I R. 89). The court below thought very much differently by stating " * * * we see no reason why he [Walker] should have done so [made a plea] in view of Wingate's declaration that, freezes or no freezes, the respondent must, within two hours, commit itself to a contract. The doing of a useless and

futile thing is no more required in collective bargaining between an employer and a labor union than in other activities. The Examiner and the Board reached the conclusion that, notwithstanding the uncertain effects of the freezes, the unwillingness of the union to consider, or even hear a request for a delay until the effects of the freezes could be appraised, the refusal of the union to consider the freezes in bargaining, and notwithstanding the union's demand for a contract or a guarantee of one within two hours, the respondent should have attempted to bargain." (III R. 80).

* * *

On Christmas Day, M. A. Stephenson, Respondent's Production Manager, was at the plant, which was not operating that day. Also, at the plant was J. E. Holly, a Teamsters member and long-time union adherant, then acting as a watchman for Respondent. On testifying, Holly quoted Stephenson as saying to him that a strike would be foolish; that it might close the plant and good men might lose their jobs; that they would all get along better if the union was "kicked out;" that the Respondent might have to meet with the union again for a time or two, but the Respondent did not intend to sign a contract with the union after February 6, 1958, when the union could be de-certified or, in the words of Holly: "* * * after February 6, which was *our* date when *we* could be de-certified * * *." (Emphasis added) (I R. 92). Holly quoted himself as saying he was disgusted and dissatisfied with the conduct of the negotiations and that there were rumors of a strike. He quoted Stephenson as suggesting that Holly and other dissatisfied employees should attempt to form a group to begin de-certification proceedings, and that they "would need legal counsel in such a matter,

but that that could be arranged offhand, off the record." Holly further testified that Stephenson told him that a pay raise would be posted on the bulletin board around the middle of January, which raise would give the employees an incentive to get rid of the union and would be retroactive to December 16th. (I R. 90).

Stephenson's version of this amazing conversation was quite different. He denied the matters of significance which Holly had testified to, such as proposing that Holly initiate de-certification proceedings and telling Holly that no contract would be made with the union. Stephenson's statement about a proposed pay raise, as he related it, was made in response to Holly's inquiry and was that Respondent was considering making a proposal on wages to the union (II R. 475-478; III R. 81). Stephenson also testified that on Christmas Day, no details of the wage proposal had been worked out as to the time of the proposal and as to the other features. The Trial Examiner credited the testimony of Holly concerning this conversation, giving various reasons for so doing, which are discussed under the Argument, *infra*. The court below concluded that "*Sound reason, in this case, requires* us to decline to go with the Examiner in crediting Holly and discrediting Stephenson." (Emphasis added) (III R. 89).

* * *

On January 4, 1958, Respondent submitted to the union a proposal for a pay raise of 5½ cents per hour. A letter recited the difficulties resulting from the freezes and stated that the offer compared favorably with raises granted by other companies (II R. 545; I R. 97). Wingate, the union's negotiator, testified that he called Stephenson after receiving the proposal and inquired whether a contract proposal was to accompany

the pay raise offer and was told, so he testified, by Stephenson " * * * we have no contract to offer." (II R. 218). Wingate testified he told Stephenson he would present the offer to the members. Wingate did not suggest another meeting at this time.

Stephenson's version was that he told Wingate that Respondent had not forgotten to send a contract, that the contract was another phase of it, and Wingate was familiar with all of the Respondent's proposals, which were before the union, except as to wages, and no further contract proposal to accompany the wage offer was required (III R. 82; II R. 469).

At the hearing the Trial Examiner inquired of Stephenson relative to this telephone call which *Wingate* had initiated:

"THE EXAMINER:

Did he [Wingate] ask for a meeting to discuss it?

"THE WITNESS:

No, sir.

Q Did he tell you at that time that he was going to present it to the membership?

A Yes.

Q Did you ever tell Mr. Wingate that that proposal on wages was made on the basis of No Contract?

A Oh, no." (II R. 469-470).

It is interesting to note that in his Intermediate Report the Trial Examiner took the following tact:

"*Stephenson* did not, however, offer to resume negotiations or state that Respondent was ready to do so.

"The circumstances which are of chief significance in evaluating the foregoing testimony [of Wingate and Stephenson relative to the telephone call] are Stephenson's admissions, in the light of

> the Company's breakoff at the December [18] meeting, that the failure to submit a contract was intentional *and his failure to indicate willingness to resume negotiations* * * *" (Emphasis added) (I R. 97).

Suffice it to say that the record does not show that Stephenson indicated his *unwillingness* to resume negotiations and the burden was not on Respondent to suggest the resumption, notwithstanding the Trial Examiner's opinion to the contrary. At any rate, the Trial Examiner found that Stephenson informed Wingate that Respondent had no contract proposal to submit with its wage offer, thus crediting the testimony of Wingate (I R. 99). The court below, in not expressly rejecting the finding of the Trial Examiner in this instance, noted that the "Examiner made no express finding with respect to the credibility of Wingate." (III R. 89). The court further noted that the Trial Examiner should have more carefully scrutinized Wingate's testimony in the light of other conflicts or inconsistencies in his testimony. (III R. 89).

* * *

Wingate wrote Stephenson a letter (II R. 547) on January 10, 1958, reporting that the membership of the union "unanimously rejected" Respondent's January 4 "*Wage Proposal*," as Wingate characterized it. It is highly significant to note that in this letter Wingate *did not even mention* Stephenson's alleged proposal on wages without a contract, a subject matter very much in the spotlight at the hearing and in the Trial Examiner's Intermediate Report. The Petitioner in its brief even misstates the fact to be that "On January 10, Wingate wrote to Stephenson and reported that on the preceding day the union membership had unani-

mously voted to reject the pay raise *unaccompanied by a contract.*" (Emphasis added) (p. 8, Petitioner's brief). In the letter it was twice said that it was a "last and final" offer, and its finality was stressed by the statement that "Unless this is acceptable to Florida Citrus Canners Coop we have no alternative but to take action as we deem necessary to bring the issues to a conclusion." (II R. 547-548). It is more than interesting to note that on January 9, 1958, the union, through Teague, wrote Adams Packing Association, Inc. what Teague characterized as an "ultimatum" letter containing verbatim language found in the letter of January 10th to Stephenson. (III R. 56, 63). Similarly, see *National Labor Relations Board v. Minute Maid Corporation*, 283 F. 2d 705, 707 (5th cit. 1960).

Significantly, another severe freeze occurred on January 8th, 9th, and 10th which caused additional damage to the Florida citrus crop (II R. 425; III R. 56). Thus, having received the union's latest ultimatum on December 11th (it is to be remembered the letter was written on the 10th at the height of the second freeze), and being encountered with the second series of freezes, Respondent did not drop everything to write the union the "prompt answer" the latter had asked for in its January 10 letter. (II R. 548). For the first time in the history of the United States Weather Bureau, snow fell in the citrus belt of Florida on January 8 and 9, 1958 (III R. 57). Notwithstanding the very real emergency Respondent and the rest of the industry found themselves in, the Trial Examiner wrote:

> "*Having received no reply* to Wingate's letter after approximately a week, the union's negotiating committee called a strike for Friday, January 17 * * * " (Emphasis added). (I R. 102).

On the basis of this record, the Petitioner somehow still maintains that it was the *Respondent* who was exploiting the emergency created by the freezes; and yet, the union gave ultimatum after ultimatum and finally dealt a severe blow at a most critical time by striking.

Concerning Respondent's failure to answer the union's letter dated January 10, the court below stated:

> "It might have been courteous for the respondent to have complied with the union's request for a reply to its January 10th letter but it was not, we think, under any duty to do so. The respondent, after negotiations were terminated on December 18th, was under a duty to resume bargaining, but only if so requested by the union. * * * The letter of January 10th was not a request for the respondent to bargain, it was a 'take-it-or-leave-it' demand with the 'or else' threat incorporated. The attitude of the union that it was not willing to negotiate was implicit, if not fully expressed in its letter. The failure of the respondent to reply to such a letter is not, we conclude, a refusal to bargain nor evidence of such a refusal." (III R. 90).

* * *

On January 14, 1958, the union filed an unfair labor practice charge against the Respondent, the basis of which was that the Respondent had refused to bargain in good faith on or about December 18, 1957, and thereafter. An amended charge, filed after the strike, had as its basis a refusal to bargain in good faith on or about July 14, 1957, and thereafter, and that on January 19, 1958, and other dates, Respondent discharged

employees in violation of Section 8 (a) (3) of the Act (III R. 85).

* * *

On or about January 16, 1958, Respondent posted to its employees a letter (II R. 549) over the signature of Stephenson, in which the employees were advised that the union had rejected the wage increase, information was requested as to threats and intimidation by employees against other employees, a report on the effects of the freezes was given, and an offer was made to furnish information or answer questions concerning the general situation. The Trial Examiner concluded that "by its notice of January 16 [Respondent] cast upon the union the blame for the failure of the employees to receive the promised wage increase, and extended an invitation to all employees to apply to Stephenson for 'information.' " (I R. 112). Of course, the union was to be blamed. The court below stated: "The Examiner and the Board characterize the posted notice as 'inviting wrath upon the union' and as 'an incentive to a union defection.' We cannot see in the offer to provide information or answer questions concerning the general situation the insidious implications which are so apparent to the Examiner and the Board. The offer follows a brief discussion of the situation relating to the freezes and would naturally relate to them. A reference to the general situation would not normally be regarded as having to do with a specific wage proposal." (III R. 91).

* * *

On Friday, January 17, 1958, a strike was called by the union. Approximately 278 employees out of the 783 within the bargaining unit went out. *This number equals a little more than a third of the total.* Assuming

the strike was an economic strike, Respondent replaced and then discharged 274 of the strikers, including J. E. Holly. Respondent also evicted ten strikers from company-owned houses. The theory of the Petitioner is, of course, that this one-third complement struck in protest against Respondent's alleged refusal to bargain in good faith and the strike was an unfair labor practice strike from its inception (I R. 103, III R. 83).

On Saturday, January 18, 1958, Wingate of the union sent Respondent's Stephenson a wire expressing the union's readiness to meet "at any time day or night" in an attempt to settle the dispute (II R. 551). On Monday, January 20th, Stephenson replied by wire that the Respondent stood "ready to meet at any mutually convenient time" (II R. 552). That same day Wingate wired Stephenson that the "union is willing and available to meet at any time as previously stated when company is prepared to meet. *Please advise*" (Emphasis added). (II R. 553). On Tuesday, January 21st, Stephenson did advise by suggesting January 29th. The next day Wingate acknowledged but requested clarification of the time (II R. 555). The next day, Thursday, January 23rd, Stephenson wired Wingate advising that after further checking Respondent's commitments, it could meet a day earlier on January 28th; it asked for an acknowledgment (II R. 556). That same day Wingate wired back acknowledging the meeting for January 28, 1958 (II R. 557).

* * *

At the January 28th meeting, Wingate, although present, was replaced as the union spokesman by a representative of the international union, J. W. Morgan. A Tom Owens of the international was also present. Some time was spent in acquainting Morgan with the

prior negotiations. But actual negotiations started and progress was made and agreements were reached on some provisions on which the parties had formerly disagreed (I R. 103-104). Respondent's negotiator's position on arbitration provoked Morgan into exclaiming that this negotiator, attorney Bowden, was taking a particular position for the Respondent in order that he might make a fee. Bowden responded by stating that he had not, at least, taken the Fifth Amendment fifty-seven times before the McClellan Committee. The negotiator sent in by the Teamsters international denied that he had asserted his constitutional immunity fifty-seven times and stated that the correct number was fifty-four (II R. 355-356). The court below stated: "This unfortunate incident, precipitated by the union, resulted in an atmosphere of tension and created another inpasse. Further negotiations at this session were, of course, impossible and the meeting broke up. The respondent declined a request for a bargaining session on that night. Bargaining was not thereafter resumed. Neither party thereafter attempted to reopen the bargaining until after it appeared that the union had lost its majority. The union representatives testified that respondent's representatives had said they would contact them. The testimony is not sufficiently explicit to sustain a refusal to bargain charge for failure of the respondent to contact the union for a resumption of bargaining." (III R. 85) (See especially II R. 226 and 342).

* * *

In late January and early February, 1958, petitions (I R. 106) were circulated by employees for the withdrawing of authorization for representation by the union. The petitions stated "WE THE UNDER-

SIGNED EMPLOYEES OF FLA. CITRUS CANNERS COOP. DO NOT WANT THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS TO REPRESENT US IN ENY WAY. AND WE WISH TO EXCEPT PAY OFFER OF JAN 4 1958."

Employee Raymond E. Sherrer testified without contradiction that after he learned the union had rejected Respondent's wage offer, he stated to employee Clyde Lanier: "I think we had better circulate a petition and see how many of the employees feels the same as we do, see if they want the Teamsters to represent them or not." Sherrer further testified: "So we prepared the petition; the other man, he prepared it, and I circulated the petition, which we done it on our own. No one asked us to and no one asked us not to." (II R. 377-388). Sherrer testified that he got the idea of the petition from the newspaper's reports of petitions being circulated through other citrus companies (II R. 382). Contemporaneously, similar disavowal petitions were circulated at Adams Packing Association, Inc. (III R. 58) and at Minute Maid Corporation (283 F. 2d at 708).

At Respondent's plant the solicitations for signature on the petition were made, in part at least, during working hours. Sherrer testified that the petitions were circulated in similar fashion to charity collections (II R. 385). The petitions were signed by 593 employees or a percentage of 76.2 percent of the total number of 778 employees (I R. 111). The petitions were delivered to the Respondent on February 7, 1958.

On February 17, Respondent advised the union by letter (II R. 558) that it had received the petitions, and it was apparent that the union did not then represent a majority of the employees.

On February 20th, Respondent announced (II R. 533) the results of the petitions and the wage increase which it had previously offered, but which had been rejected by the union, would be put into effect retroactive to December 16, 1957. The court below disagreed with the Petitioner that this wage increase was illegal under the Act since it was not greater than was offered during collective bargaining and since the union had lost its representation of the bargaining unit (III R. 92).

On February 24th, after pondering Respondent's letter of February 17th for a full week, Wingate requested a meeting (II R. 570). The Respondent, through Stephenson, declined to meet unless the union was prepared to show that it then represented a majority. Stephenson stated in his letter dated March 5, 1958, that Respondent had "reasonable and adequate cause to question" the union's majority status. Stephenson then stated that if the union had evidence that they represented a majority, the Respondent would be glad to receive it for evaluation. (II R. 561). The certification year for the union ended on February 6, 1958. The union never tried to disprove Respondent's good faith doubt of its majority status.

In concluding that it was clear Respondent had not failed in its duty to bargain at the time of the strike nor on January 28, 1958, the court below held that the 274 strikers who had been replaced and discharged before requesting reinstatement are not entitled to reinstatement with backpay (III R. 90, 85).

The court below concluded that the determination by the Petitioner that the loss of the union's majority was attributable to unfair labor practices of the Re-

spondent is not supported by substantial evidence on the record as a whole (III R. 91).

The court below also concluded that the Respondent was not obligated to bargain with the union until the certification was rescinded in a new Board election, since the general rule does not require an employer to bargain with a union which has demonstrably lost its majority and where the filing of a petition for de-certification would be futile (III R. 92).

The Trial Examiner noted that the principal issues( was there a refusal to bargain and if so, when) made the remaining issues, in comparison, minor ones involving a "miscellany" of alleged interference, restraint, and coercion, and the alleged discrimination against certain tenant strikers through efforts at eviction (I R. 70). Relative to the latter, the court below held that the Respondent is entitled to the possession of the company-owned houses from which certain of the striking employees refused to move, as such employees had been lawfully replaced and discharged (III R. 90).

Relative to the "miscellany," the court below agreed with the Trial Examiner in his characterization of the "miscellany" as minor incidents insufficient to form the basis for an unfair labor practice case (III R. 93).

## SUMMARY OF ARGUMENT

The Petitioner argues that the court below "grossly misapplied" the "substantial evidence" standard as explained in *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474 (1951). It reasons that the court below has misapprehended the "substantial evidence" standard because it set aside, indeed "reversed," findings of the Trial Examiner and

the Board concerning the credibility of the witnesses. The Petitioner argues not without merit that the trier of facts has the best opportunity to assess credibility since demeanor evidence has traditionally been considered a good guide in determining veracity, and the trier's credibility findings "must be accepted by a reviewing court 'unless on its face it is hopelessly incredible *** or flatly contradicts either a so-called "law of nature" or undisputed documentary testimony.'" (p. 17, Petitioner's brief.)

The Respondent might agree with this argument if the Petitioner would admit that Courts of Appeals should *never* have to accept credibility findings if such courts are of the firm belief that the trier did not possess the mandatory impartiality or used an improper basis in crediting witnesses. It must be remembered that in addition to believing the Trial Examiner had an improper attitude and approach, the court below found "sound reason" for not accepting the crediting of Holly (the Trial Examiner mentioned demeanor) and found substantial reasons to conclude that the Trial Examiner should have (but did not) "carefully scrutinized" the testimony of Wingate whose testimony was a mass of contradictions (the Trial Examiner did not even mention demeanor in crediting Wingate nor even make express findings concerning his credibility). (III R. 89).

Respondent contends that the *Universal Camera* standard in no wise conflicts with the judgment of the court below and submits that the Petitioner has failed to show how it does so conflict or how the standard was grossly misapplied.

The considerations and concern of the court below certai[illegible] are enough to refuse enforcement of Petition

er's order because of unsubstantiality; the opinion of the court below shows that there has been a careful and fair assessment of the record.

The Petitioner's second argument that the court below further erred in declining to sustain the Board's findings that Respondent has engaged in independent violations of Section 8 (a) (1) of the Act is untimely and not properly before this Court, since the question presented in the Petition does not cover this contention. The Petitioner is therefore raising an additional question, notwithstanding the clear meaning of Rule 40 (2) of the Revised Rules of this Court.

## ARGUMENT

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals." *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, 491 (1951).

On March 27, 1961, the United States Court of Appeals for the Fifth Circuit rendered its unanimous Judgment (III R. 94) denying the Petition of the National Labor Relations Board for Enforcement of an Order of that Board made on October 14, 1959. The Petition for a writ of certiorari was filed by the Petitioner on May 17, 1961, and was granted on October 9, 1961 (III R. 96, 368 U.S. 812).

In the court below and in this Court, the Petitioner seeks enforcement of its Order which would require,

The carving out of a segment of a Labor Board record and stamping the segment "unreviewable" is but the beginning of the shackling of the reviewing function of our Courts of Appeals in Labor Board cases.

The Petitioner argues in its brief (p. 19) that the "the court [below]has made an even more basic incursion into the Board's factfinding function, by setting aside a Board Trial Examiner's resolutions of credibility which were not plainly unreasonable."

The court below simply could not accept the Board's Order since it was unsubstantiated. This is *not* a case where the Court of Appeals differs with the trier of facts as to who was and who was not telling the truth on conflicting testimony. This *is* a case where the record has caused the Court of Appeals to refuse to accept this Examiner's credibility resolutions. Thus, the court below did not, as the Petitioner contends, end up crediting those witnesses that the Examiner refused to credit. It did not have to do this in order to deny enforcement. It *disapproved* of the Examiner's theory, approach, and attitude in crediting witnesses. This was one of the reasons the court below could not grant the Order for which it was petitioned.

Moreover, the learned court below obviously thought that some of the Trial Examiner's credibility resolutions *were* "plainly unreasonable," notwithstanding the Petitioner's opinion to the contrary that such resolutions "were not plainly unreasonable."

Concerning the testimony of Holly, which was critical to the General Counsel's case, (see III R. 82) the court below obserevd:

> "The finding of an anti-union feeling is based entirely on the Holly testimony. All of the conduct

of the respondent was viewed in the light of such finding. *The Examiner's finding of a plan of the respondent not to bargain is dependent upon crediting Holly's testimony.* Inferences drawn against the respondent were supported by the assumption that its conduct was motivated by hostility to the union. It might be said that Stephenson, as a part of the respondent's management, was not a disinterested witness. But he was no more interested than Holly, who had gone on strike, had been replaced, and was [and is] hoping for reinstatement with back pay. Notwithstanding the absence of any prior anti-union animus or action of the respondent, and notwithstanding the improbability that the respondent's production manager would disclose its labor program and its plans for carrying out such program to a plant watchman [Holly], the Examiner believed Holly and disbelieved Stephenson. The Board adopted the Examiner's finding. *Sound reason, in this case, requires us to decline to go with the Examiner in crediting Holly and discrediting Stephenson.*" (Emphasis added) (III R. 89)

Thus, the court below not only was of the opinion that the Trial Examiner's crediting of Holly was "plainly unreasonable," it also was of the opinion that "the Examiner was of the belief that reliance may not be placed upon the testimony of a witness who is a part of the management of an employer in a controversy with a labor union." (III R. 88)

Consider the Trial Examiner's "carefully documented" resolution of the credibility of Holly:

"In resolving the credibility issues presented by

the foregoing testimony, the following points are significant:

[1] "Stephenson admitted the holding of the conversation and that it covered the subjects of a company union and the Company's contemplated wage offer. Though testifying that it was Holly who injected the company union question into the conversation, Stephenson refrained from testifying what his own response to the suggestion was.

[2] "Holly's long time employment, his long time connection with the former union, his absence of a position with Teamsters, and his criticism of that union, its representatives, and the negotiations obviously marked him as promising material to lead a defection movement.

[3] "Stephenson's promises and predictions, as Holly testified to them, later came through exactly as prophesied, save that the wage offer was posted a week earlier than Stephenson had indicated. Later developments, summarized *infra*, showed that Respondent assisted the movement to 'kick the Teamsters out,' which Holly's testimony showed that Stephenson was intent on sponsoring and assisting.

[4] "Finally, Holly was an impressive witness both on direct and on cross-examination, while Stephenson, in comparison, *sometimes* reflected on cross-examination a demeanor and manner of reluctance in testifying which prevented acceptance of his testimony at face value. Holly's testimony is therefore credited." (Emphasis added) (I R. 94).

The Trial Examiner's very first "significant"

point above seems to be totally insignificant. Stephenson did not "refrain" from anything; the General Counsel simply "refrained" from cross-examining Stephenson as thoroughly as the Trial Examiner might have. And the fact that Stephenson "admitted" the holding of the conversation cannot possibly be said to be probative to show that Holly is telling the truth.

The second "significant" point of the Trial Examiner contains elements that would be persuasive to argue that Holly would "obviously" *not* be "promising material to lead a defection movement." The Examiner accurately observed that Holly did not have a position with the Teamsters, but the Examiner failed to add that Holly was a member of the Teamsters and would thus be likely to remain loyal to his most recent union —loyal all the way through testifying in an unfair labor practice trial.

The obvious fallacy in the logic of "significant" point three is that the Trial Examiner believes that hindsight is a mark of credibility.

The first three "significant" points of the Examiner are actually insignificant points that do not withstand analysis. Appropriately, the Board recently had occasion to state:

> "We adopt the Trial Examiner's resolutions of credibility in this case only insofar as his findings are based upon his observation of the witnesses and their demeanor at the hearing. However, we do not adopt his analysis of the credibility of the witnesses to the extent such analysis appears to be based upon needless speculation as to the witnesses' conduct with respect to minor details." *Bryan Brothers Packing Company*, 129 N.L.R.B. 285 (1960).

In point four, the Trial Examiner's observation that Stephenson "sometimes reflected on cross-examination a demeanor and manner of reluctance in testifying which prevented acceptance of his testimony at face value" actually proves nothing in evaluating credibility, since it obviously does not matter how reluctantly a witness testifies if he tells the truth. Reluctance, especially on cross-examination, would reflect deliberation and weighing before answering under oath. Moreover, the fact that Stephenson "sometimes" revealed tale-telling demeanor evidence leads to the conclusion that at other times his demeanor apparently satisfied the Trial Examiner. The world is required to assume that the times the Trial Examiner spotted this demeanor evidence were the time Stephenson was being cross-examined on testimony which conflicted with Holly's. It is obvious from his Intermediate Report that the Trial Examiner's crediting of Holly is not bottomed upon his observation of Stephenson and the latter's demeanor, but upon irrational "speculation" of which the Board even disapproves. Respondent submits that this, too, is more evidence of the Trial Examiner's improper basis for crediting witnesses. For another of the Trial Examiner's "carefully documented" resolutions see I R. 97-99. (Wingate)

The Petitioner ardently argues that the court below erred in rejecting the Trial Examiner's "carefully documented resolutions of credibility." (Petitioner's brief, p. 22). Indeed, the Petitioner has erroneously argued in its brief (p. 14) the following point: "Concluding that 'the findings of the Examiner and the Board [were] dependent upon the acceptance of the testitmony of Messrs. Wingate and Holly rather than

the contradictory testimony of witnesses for the respondent,' the court reversed the Examiner's credibility resolutions on the ground that he had proceeded on an improper basis in deciding which witnesses to believe." What the court below actually said was: "To a considerable extent the findings of the Examiner and the Board are dependent upon the acceptance of the testimony of Messrs. Wingate and Holly rather than on the contradictory testimony of witnesses for the respondent." (III R. 86). Thus, the court below did not *conclude* what the Petitioner argues, and, most significantly, the court below did not state that its judgment in denying enforcement is based upon its disbelief of the testimony of Wingate or Holly or even its disapproval of the improper basis used for determining credibility.

Subsequent to the court below's above quotation, the court below carefully pointed out that the "Examiner's finding of a plan of the respondent not to bargain [in good faith] is dependent upon crediting Holly's testimony. Inferences drawn against the respondent were supported by the assumption that its conduct was motivated by hostility to the union." (III R. 89). This is absolutely correct; in essence the Petitioner's entire theory that Respondent refused to bargain in good faith (after the Trial Examiner admitted Respondent bargained in good faith for several months) (I R. 113) stems from the testimony of *one witness*. Even if the court below had been persuaded that Holly's testimony was not plainly improbable and the Trial Examiner had proceeded on a proper basis in determining credibility, it is patent from its opinion that the court below was not convinced as a matter of law that Respondent had refused to bargain in good faith. Granting the Petitioner everything it argues,

the Board still is left with a very unsubstantial record to argue that Respondent refused to bargain in good faith. The Trial Examiner's Intermediate Report can hardly convince the most objective reader. (I R. 66-144). For example, the Trial Examiner concluded the following concerning the December 18, 1957, meeting (the Trial Examiner and Board found that on and after this date the Respondent refused to bargain in good faith):

> "Its [Respondent's]failure to do so [plead for postponement of bargaining because of the emergency, i.e., the freeze of December 12] and its outright refusal to enter into discussions of any sort, in purported reliance on Wingate's threat [two hour ultimatum] constituted, *of course*, a refusal to bargain." (Emphasis added) (I R.114).

The court below, however, concluded otherwise than that Respondent had "of course" acted improperly or failed to act properly by not giving forth with a knee-on-the floor appeal after the union's ultimatum:

> "The Examiner and the Board reached the conclusion that Walker should have made his plea for suspension of negotiations, but we see no reason why he should have done so in view of Wingate's declaration that, freezes or no freezes, the respondent must, within two hours, commit itself to a contract. The doing of a useless and futile thing is no more required in collective bargaining between an employer and a labor union than in other activities. The Examiner and the Board reached the conclusion that, notwithstanding the uncertain effects of the freezes, the unwillingness of the union to consider or even hear a request for a

delay until the effects of the freezes could be appraised, the refusal of the union to consider the freezes in bargaining, and notwithstanding the union's demand for a contract or a guarantee of one within two hours, the respondent should have attempted to bargain." (III R. 80)

Thus, the court below concluded: "We think *it is clear* that the respondent had not failed in its duty to bargain at the time of the strike." (Empasis added) (III R. 90).

If the question before this Court was whether the "totality-of-conduct" test or the "*per se*" rule of good-faith bargaining under the Act should apply in the instant situation, Respondent submits that the former would be the only proper test to be applied. (See III R. 61). That is, whether the Respondent met its good-faith bargaining obligation under the Act must be determined on the basis of the "totality of its conduct" during the negotiations. *National Labor Relations Board v. Insurance Agents' International Union*, 361 U.S. 477 (1960). Considering the totality of both parties' conduct, Respondent submits that it was the Teamsters union, not the Respondent, who was guilty of bad-faith bargaining.

The Trial Examiner's and Petitioner's conclusion that Respondent exploited the emergency created by the freeze of December 12, 1957, and then deliberately framed a course of conduct to avoid bargaining, is simply a conclusion that ignores economic realities and the intolerable conduct of union negotiator Wingate and the conduct of the other Teamster's negotiators during this critical time. The *union* exploited the emergency created by the freezes in order to save a situation brought about by the *union's* maladroit bargaining.

The Petitioner has no where in its brief attempted to show how the court below "grossly misapplied" the standard of review laid down by this Court in *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474 (1951). Such case and standard, although both significant, do not attempt to deprive Courts of Appeals the right (and duty) to deny enforcement of Board Orders based on an Intermediate Report written by a Trial Examiner found to be using an improper attitude and approach. How can such a finding be said to be "grossly misapplying" the "substantial evidence" standard? It is not insignificant that the court below had before it the Intermediate Report (III R. 37) of another Trial Examiner who assessed quite differently the conduct of another citrus company under very similar circumstances and with the same union at the same period of time. See *Adams Packing Association, Inc.* (III R. 37) 44 L.R.R.M. 1571. A full appreciation of the Teamsters' behavior at this time can be had only by reading the latter case and *National Labor Relations Board v. Minute Maid Corporation*, 283 F. 2d 705 (5th Cir. 1960).

In *Universal Camera* this Court stated:

> "We conclude, therefore, the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness *and fairness* of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the

requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

"From this it follows that enactment of these statutes does not require every court of appeals to alter its practice. Some—perhaps a majority—have always applied the attitude reflected in this legislation. To explore whether a particular court should or should not alter its practice would only divert attention from the application of the standard now prescribed to a futile inquiry into the nature of the test formerly used by a particular court.

"Our power to review the correctness of application of the present standard ought seldom to be called into action. *Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals.* This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." (Emphasis added): 340 U.S. at 490.

It is axiomatic that the position of the Courts of Appeals is that of an appellate tribunal. Accordingly,

its function is to rule on the law. Section 10 (e) of the Act states that the Board's finding of fact shall be conclusive *if* they are supported by substantial evidence on the record as a whole. Whether they are so supported is a question of law for the Courts of Appeals to decide.

In *Universal Camera* this Court held that the Courts of Appeals are not bound by the Board's rejection of a trial examiner's findings since the record considered as a whole includes the Intermediate Report of the Examiner.

This Court pointed out that when the Board should disagree with the conclusions of the Trial Examiner that this would only indicate that the evidence supporting these conclusions might be less substantial than in the case where the Examiner and Board reach the same conclusions. This Court also stated that the "substantial evidence" standard is not modified in any way when the Board and its Examiner disagree. Then this Court stated: "*The findings of the examiner are to be considered along with the consistency and inherit probability of testimony.* The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is 'substantial.' " (Emphasis added) 340 U. S. at 496.

It would follow that a reviewing court would find signs of unsubstantiality of the evidence and the conclusions of the Examiner if such court could not bring itself to either accept or have faith in the credibility resolutions of the Examiner, which resolutions might or might not be important to the General Counsel's

case. Respondent strongly contends that if credibility is of great importance to a particular case, then the Courts of Appeals must, under the "substantial evidence" standard, review and assess those credibility findings and the basis of those findings.

Why should the Board have this right to review and assess credibility findings and the basis of such findings of the Trial Examiner, and then the right (indeed, the duty) be denied the Courts of Appeals who manifestly must review and assess the entire record to determine substantiality? In a recent case the Board *reversed* the Trial Examiner's credibility findings regarding the General Counsel's witnesses and accorded no probative value to their testimony on direct examination regarding Section 8(a)(1) violation, where the testimony was contradicted on cross-examination. *Midstate Hauling Co., Inc.*, 129 N.L.R.B. 1150 (1961). The Board has also stated:

> "The General Counsel excepts, *inter alia*, to the Trial Examiner's finding that the Respondent had not discriminatorily discharged Lloyd Garten. The Trial Examiner based his finding primarily upon his credibility resolutions, and it is these resolutions which the General Counsel urges are erroneous. We find it unnecessary to pass upon the soundness of these credibility resolutions *since even if we were to credit the General Counsel's witnesses* we would find that the General Counsel had not sustained his burden of proving by a preponderance of the evidence that Garten had been discharged in violation of the Act." (Emphasis added). *Gross Telecasting, Inc.*, 129 N.L.R.B. 490 (1960).

Notwithstanding the clear implications and mean-

ing of such Board decisions as these just cited, the Petitioner states in the first sentence of its argument (p. 17, Petitioner's brief) that "The action of the court below in setting aside the major portion of the Board's order is contrary to the settled principles governing the resolution of credibility."

The Petitioner in its Petition and in its brief cries for this Court to admonish the court below "in substituting its judgment respecting the credibility of witnesses for that of the Trial Examiner and the Board * * * " (p. 28, Petitioner's brief). Of course, that is not exactly what occurred. Notwithstanding, the Petitioner has unjustly attempted to paint a picture of a meddling Court of Appeals. That this respected court below well knows, understands, and applies correct principles in this area, when reviewing cases that did not trigger its concern, is shown by statements from other decisions, both before and after its decision herein.

> "There was a wide cleavage between the story of respondent's witnesses and that related by the union representatives. That the recollection of some of the witnesses are faulty will not be questioned. *Nothing is here present calling for the application of any modification of the general rule that in such situations as the one before us, determination of questions of credibility are for the Board.* (Emphasis added). *National Labor Relations Board v. Gibbs Corporation, et al.*,—F.2d—, 49 L.R.R.M. 2340 (5th Cir. 1962).
>
> * * *
>
> "Presented for our determination are questions as to whether substantial evidence supports the

> Board's findings. We are not called upon to resolve any novel questions of law. In many instances there is a sharp conflict between the testimony of an employee or former employee of the Newton Company and that of a representative of the company's management as to conversations had. The Trial Examiner has resolved these questions and, for the most part, the Board has followed the Examiner's findings. It is proper that we do likewise *in the absence of compelling reason.* That the Examiner has for the most part credited the testimony of employees and discredited that of management is not among the grounds that might justify our up-setting findings of fact in such situations." (Emphasis added). *National Labor Relations Board v. The Newton Company,* 236 F. 438, 443 (5th Cir. 1956).

It is apparent from its opinion that the court below found a very "compelling reason" to question the Trial Examiner's credibility findings in the instant case. Respondent respectfully submits that by so doing the court below did not misapply and, certainly, did not "grossly misapply" the standard of review laid down in the *Universal Camera* case.

The Petitioner's second argument that the court below further erred in declining to sustain the Board's findings that Respondent had engaged in independent violations of Section 8 (a) (1) of the Act is untimely and not properly before this Court. The Petitioner has raised additional questions by arguing the evidence; these additional questions were not presented to this Court in the Petition for a writ of certiorari. The Petitioner has thereby completely disregarded Rule 40(2) of the Revised Rules of this Court.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

HAMILTON & BOWDEN

By

(O. R. T. Bowden)
Attorneys for Respondent

February, 1962